INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)

This is the summative (or formal) assessment for Module 1 ***of this course and is compulsory for all registered candidates on the Foundation Certificate. The mark awarded for this assessment will determine your final mark for Module 1. In order to pass this module you need to obtain a mark of 50% or more for this assessment.***

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. ***You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.***

2. ***All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters*** – please do not change the document settings in any way. DO NOT ***submit your assessment in PDF format as it will be returned to you unmarked.***

3. ***No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).***

4. ***You must save this document using the following format:*** [studentID.assessment1summative]***. An example would be something along the following lines: 202223-363.assessment1summative.*** Please also include the filename as a footer to each page of the assessment ***(this has been pre-populated for you, merely replace the words "studentID" with the student ID allocated to you). Do not include your name or any other identifying words in your file name.*** Assessments that do not comply with this instruction will be returned to candidates unmarked***.***

5. ***Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments.*** Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words***.***

6. ***The final submission date for this assessment is*** 15 November 2022***. The assessment submission portal will close at*** 23:00 (11 pm) GMT on 15 November 2022***. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.***

7. ***Prior to being populated with your answers, this assessment consists of*** 10 pages***.***

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct***. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph*** in yellow***. Select only*** ONE ***answer. Candidates who select more than one answer will receive no mark for that specific question.***

Question 1.1

Civil Law and English (Common) Law countries have the same historical roots. Select from the following the best response ***to this statement.***

(a) This statement is untrue because English Insolvency Law developed from Roman law principles, and Civil Law Systems were based on the statute of Marlborough of 1267.

(b) This statement is untrue since Civil Law developed from early Roman law principles relating to debt recovery and English Insolvency Law developed via legislation, especially from the 16th century onwards.

(c) This statement is true since, on a principle basis, the developments of insolvency law as a system is the same in all systems.

(d) The statement is true since both systems developed from a pro debtor approach towards the notion of over-indebtedness.

Question 1.2

Both Civil Law and English Law systems in general allowed for a rather liberal discharge of debt for over-indebted debtors right from the inception of these systems. Select from the following the best response ***to this statement.***

(a) This statement is untrue since in both systems the notion of discharge only developed at a later stage.

(b) This statement is true since in both systems insolvency and rehabilitation procedures developed with discharge as a way of departure.

(c) This statement is untrue since discharge of debt never became part of any of these systems.

(d) This statement is true since creditors in both systems had an accommodative approach towards over-indebted debtors.

Question 1.3

England and America each have their own single unified piece of insolvency legislation which apply to both personal and corporate insolvency. Select from the following the best response to this statement.

(a) This statement is true since England has the unified 1986 Insolvency Act and the USA has the 1978 Bankruptcy Code. Both Acts cover personal and corporate insolvency.

(b) This statement is untrue since in England the Insolvency Act 1986 deals only with personal insolvency.

(c) This statement is untrue because the USA has separate Acts dealing with corporate liquidation and rescue.

(d) The statement is true since in England its companies' legislation deals with corporate insolvency and rescue.

Question 1.4

There are no good reasons to distinguish between insolvency rules pertaining to individuals (consumers, natural person debtors, also referred to as personal insolvency) and those insolvency rules applying to corporations or companies since in both instances the applicable insolvency rules are intrinsically collective in nature. Select from the following the best response to this statement.

(a) The statement is true since global insolvency law systems provide exactly the same rules to cover all aspects of insolvency in both instances, ie personal insolvency and corporate insolvency.

(b) The statement is untrue since there are pertinent differences in the treatment of certain aspects in insolvency of an individual and that of a company, like the fact that individuals are not "dissolved' after their estate assets have been liquidated as is the case once the assets of a company have been liquidated and it is finally wound up.

(c) The statement is untrue since insolvency law rules are not collective in nature.

(d) The statement is true since insolvent companies usually survive their liquidation and may continue to conduct business after the debt has been discharged through the liquidation process.

Question 1.5

All countries have one and the same set of rules to apply in the case of recognition of a foreign insolvency order. Select from the following the best response to this statement.

(a) The statement is untrue since the systems differ and some countries have no formal cross-border insolvency rules in place at all.

(b) This statement is true because all member states of the UN have adopted the UNCITRAL Model Law on Cross-Border Insolvency.

(c) This statement is true because the UNCITRAL Model Law on Cross-Border Insolvency applies directly to all UN member States.

(d) This statement is true since the International Court of Justice has a set of global cross-border insolvency principles that apply globally.

Question 1.6

The domestic corporate insolvency laws of a particular country make no mention of the possibility of a foreign element in a liquidation commenced locally. There is also no locally applicable treaty or convention on insolvency proceedings in place.

In a local liquidation commenced in that country, to what other area of domestic law can the local court refer in order to resolve an insolvency related international law issue that has arisen because of concurrent insolvency proceedings over the same debtor in a different country?

(a) Public International Law.

(b) UNCITRAL Legislative Guide on Insolvency Law.

(c) World Bank Principles for Effective Insolvency and Creditor Rights Systems.

(d) Private International Law.

Question 1.7

Private international law raises questions of the conclusive effect of a foreign judgment and the enforcement of a foreign judgment. A German court has issued a judgment in a German insolvency which has a connection with England. The foreign insolvency office holder seeks recognition and enforcement in an English court of the insolvency order made in the German insolvency proceedings.

Which of the following statements, concerning the request for recognition and enforcement in England, is true?

(a) The English Court hearing the request for recognition and enforcement may apply the EU Recast Insolvency Regulation (2015).

(b) It is relevant factor for the English Court hearing the matter to consider whether Germany has adopted the UNCITRAL Model Law on Cross-border Insolvency 1997, or not.

(c) The English Court will be able to consider the request based on its 2006 Insolvency Regulations (the adopted UNCITRAL Model Law on Cross-Border Insolvency) and / or common law principles.

(d) The German order will be automatically recognised in England due to a cross-border insolvency treaty between England and Germany.

Question 1.8

Which of the following best describes international insolvency law?

(a) It is public international law governing insolvency law between States.

(b) It is private international law governing insolvency law between States.

(c) It may involve aspects of both public international law and private international law.

(d) It involves a simple classification within either public international law or private international law.

Question 1.9

To date, the most successful soft law approach to international insolvency law issues has been the Model Law on Cross-border Insolvency. Select from the following the best response to this statement.

(a) This statement is untrue because not all States have adopted the Model Law on Cross-border Insolvency.

(b) This statement is untrue because of the requirement for reciprocity in relation to the Model Law on Cross-border Insolvency.

(c) This statement is true because the Model Law on Cross-border Insolvency creates regulations which binds each State and has been the most influential response to international insolvency law issues.

(d) This statement is true because the Model Law on Cross-border Insolvency has been adopted by numerous States and is gaining momentum as an influential response to international insolvency law issues.

Question 1.10

Latin American States have some of the most long-lasting multilateral agreements regarding international insolvency issues. Select from the following the best response ***to this statement.***

(a) This statement is untrue because the Bustamante Code was concluded in 1928, which was only a few years before the Nordic Convention of 1933.

(b) This statement is untrue because North America was not a party to these agreements.

(c) This statement is true because agreements such as the Escazú Agreement have been extremely long lasting.

(d) This statement is true because of agreements such as the Montevideo Treaties and Havana Convention on Private International Law.

Marks awarded 8 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

Briefly indicate the historical roots of the various insolvency law systems to be found in African jurisdictions.

Most African countries adopted the laws and practices of their former colonial powers, including their insolvency systems. Accordingly, the prevalent systems are similar to or based on English law (Eastern Africa, Kenya etc) or civil law, similar to that of Portugal (Angola, Mozambique) or France ((West and North Africa). Some countries also have mixed legal systems since they were exposed to both civil and common law systems (e.g. South Africa and Namibia).

3

Question 2.2 [maximum 3 marks]

Indicate what important events and / or developments gave rise to some insolvency law reform in Eastern Asia and provide two examples of such reform initiatives.

The 1998 financial crisis in East Asia had a dramatic effect on some countries in the region and led to reforms of the insolvency laws in many countries. For example, it resulted in Thailand overhauling its bankruptcy laws and, also, the

emergence of Singapore as an increasingly influential jurisdiction in the region. This was further enhanced when Singapore enacted their new Insolvency, Restructuring and Dissolution Act to consolidated their existing insolvency laws on 30 July 2020.

3

Question 2.3 [maximum 4 marks]

Briefly indicate the various initiatives undertaken to assist with the resolution of international insolvency issues between North America and Canada and the success or otherwise of these initiatives.

Canada and the USA failed in an attempt to implement a bi-lateral treaty in the 1970s but both have adopted the UNNITRAL Model Law on Cross Border Insolvency which has facilitated cooperation on cross border insolvency issues. In addition, the American Law Institute has also made efforts to facilitate the resolution of international insolvency issues between NAFTA countries (USA, Canada and Mexico) by appointing experts in each jurisdiction and preparing 'Principles of Cooperation' regarding each countries insolvency laws which were approved and adopted by all NAFTA members in 2000. These govern corporate insolvency only and have increased cooperation between NAFTA members provided useful guidelines for issues such as, inter alia, recognition, administration and distribution.

There is scope to elaborate. While the question says 'briefly' it is for 4 marks. There was scope to discuss, for example, *Re Nortel Networks Corporation* [2016] ONCA 332; *In re Nortel Networks, Inc.*, 669 F.3d 128

2

Marks awarded 8 out of 10

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 5 marks]

It is said that one of the difficulties in designing a proper cross-border insolvency dispensation is the fact that domestic insolvency laws and approaches towards insolvency in various jurisdictions are not the same and in fact sometimes differ vastly. Discuss the possible historical reasons for the difference in approaches regarding the treatment of voidable dispositions, given the way such rules developed in English law and civil law jurisdictions respectively. In your answer you must provide a context or framework for the treatment of these rules in insolvency systems and indicate why these rules are important in insolvency.

The laws governing voidable dispositions (which incorporates fraudulent conveyances) can be traced back to the 'actio Pauliana' in civil law traditions, and the Act of Elizabeth of 1570 in English law. Despite the differences in these legal systems, the basis for being be able to make enquiries into potentially voidable dispositions is the same across both. Such transactions undermine the collective debt collection mechanism and could lead to dispositions by the insolvent at an undervalue with the intention of preferring one creditor or class of creditor over another to the detriment of the general body of creditors. In spite of the fact that different jurisdictions may traditionally have differing approaches to insolvency law (i.e. some are more 'debtor' friendly than others or permit a fresh start), such an unfair preference is contrary to the established principles of insolvency such as those set out in Part 1 of the UNCITRAL Legislative Guide. Accordingly, both systems have adopted a general prohibition on such voidable dispositions which encourages debtors to use traditional and approved insolvency processes instead.

There is scope to elaborate. While the question says 'briefly' it is for 5 marks.

4

Question 3.2 [maximum 5 marks]

A Dutch commentator on international insolvency law defines international insolvency law as that part of the law that:

> ***"[i]s commonly described in international literature as a body of rules concerning certain insolvency proceedings or measures, which cannot be fully enforced, because the applicable law cannot be executed immediately and exclusively without consideration being given to the international aspect of a given case."***

However, the author concedes that this definition has limitations. Briefly discuss the reasons why the definition is perceived to have limitations.

This definition does indeed have limitations as it fails to reveal anything particularly useful about international insolvency law. It appears to ascribe an aspect of universalism to international insolvency law and essentially says that one must always consider the international aspects of each case. However, it fails to take into account the reality that, although there is such a thing as international insolvency law and some countries do adopt a more 'universal' approach, many more countries are more inclined to adopt a more territorial approach and prefer to deal with local interests and local creditors without necessarily ensuring cooperation foreign officeholders or jurisdictions.

There is scope to elaborate. While the question says 'briefly' it is for 5 marks.

4

Question 3.3 [maximum 5 marks]

Briefly discuss treaties or conventions as a source for cross-border insolvency law. In your answer you should also indicate if these are viewed as a successful way in establishing such rules by providing examples in this regard.

Treaties and conventions have been a successful source of cross-border insolvency law. It would be beneficial to explain the nature of treaties and conventions. ***There are may reasons for this. In many case they are enacted by jurisdictions which are geographically and / or culturally similar which makes it more likely that they will be successful (as they are likely to be based on similar legal traditions etc.). Examples of such successful treaties between countries in a certain region are the Montevideo Treaties of 1889 and 1940 and the Havana Convention on Private International Law (1928) which cover Latin America. Canada and the USA failed in an attempt to implement a bi-lateral treaty in the 1970s but, as described above, both have adopted the UNNITRAL Model Law and the 'Principles of Cooperation' prepared by the American Law Institute. The EU has also been successful in adopting regulations to harmonise insolvency law across member states which ultimately resulted in the adoption of the European Insolvency Regulation (EIR) by member states (now EIR Recast). Other regions have had similar success implementing cross-border treaties such as the Nordic Convention comprising five Scandinavian states and the Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA) in Sub- Saharan Africa.***

There is scope to elaborate. While the question says 'briefly' it is for 5 marks.

4

Marks awarded 12 out of 15

QUESTION 4 (fact-based application-type question) [15 marks in total]

Flor Prim Pty Ltd (FPPL) is a company incorporated with its head office and significant operations in Encanto as well as being registered as a foreign company in Asgard, where it also carries on business. FPPL therefore carries on business in more than one State. Lobo Lending Ltd (Lobo) is incorporated and has its head office in Asgard.

FPPL is managing to meet its debts as they fall due in Encanto. However, due to various staffing issues combined with market turndown in Asgard, FPPL is struggling financially in Asgard. FPPL has fallen behind with payments due and owing to Lobo. FPPL's CEO approaches Lobo to discuss possible informal payment arrangements.

If you require additional information to answer these questions, briefly state what it is and why it is relevant.

Question 4.1 [Maximum 5 marks]

What are the main differences between "formal" insolvency proceedings and "informal" insolvency arrangements? What key advantages and disadvantages should Lobo consider regarding any informal out-of-court workout arrangement it could enter with FPPL, compared with its formal debt recovery options?

Informal arrangements can be agreed between parties and can avoid the stigma which can sometimes attach to formal or court administered insolvency proceedings and so avoid unwanted negative publicity. They are also likely to be less costly than formal court processes. However, some major disadvantages are that there will be no moratorium in place to prevent creditors from bringing claims and / or launching formal insolvency processes and there is no way of binding dissenting creditors who are not in favour of the informal arrangement (who are free to then launch their own formal insolvency proceedings).

This question also asks about the main differences between formal and informal arrangements. There is scope to elaborate in explaining them.

3.5

Question 4.2 [Maximum 5 marks]

Assume that instead of the scenario described above, Lobo obtained a formal court order against FPPL for a court-supervised insolvency proceeding in Asgard. The Asgardian insolvency representative then discovered there was already a concurrent insolvency proceeding commenced against FPPL in Encanto. Detail difficulties that may arise for the insolvency representative pertaining to co-operation and co-ordination and the international insolvency instruments that have been developed to assist with respect to those difficulties. In your answer make sure to comment as to whether the development of these international insolvency instruments is important and why, or why not.

The first thing to establish is whether the respective domestic insolvency laws of Asgard and Encanto make provision for the recognition of foreign insolvency proceedings. If not, it will be far more difficult for the insolvency representative as he will not be able to rely on the cooperation of the Encanto authorities or his opposite number who will likely be appointed to deal with the assets in that jurisdiction. International insolvency instruments have sought to address these potential difficulties and take many forms, including some of the regional treaties and / or conventions identified above (EIR Recast, Monteveido Treaties etc). However, other instruments from a variety sources have also sought to harmonise domestic insolvency laws with varying degrees of success. The UNCITRAL Legislative Guide on Insolvency Law published in 2004 is perhaps the most effective of these instruments and is intended to be used by national authorities / legislative bodies as a reference when preparing or updating legislation in order to ensure some level of harmonisation between insolvency laws in different jurisdictions. Other instruments include the International Bar Associations Model Bankruptcy Code of 1997 and the World Bank's Principles for Effective Insolvency and Creditor / Debtor Regimes which are regularly

revised and updated. The development of these insolvency instruments has been an important factor in the advancement of cross-border insolvency and the resulted in increased cooperation between jurisdictions.

There is some scope to elaborate on relevant international instruments.

4

Question 4.3 [Maximum 5 marks]

Assume that instead of the hypothetical facts mentioned above, FPPL is an incorporated company with offices in the UK, and throughout Europe and other non-European countries. Lobo is its major creditor and is incorporated in a country in Europe. An insolvency proceeding against FFPL was opened in the UK by a minor creditor on 30 June 2022. A month later, Lobo was considering also opening proceedings in another country in Europe. Discuss whether the European Insolvency Regulation Recast would apply with respect to the UK commenced insolvency proceedings, and the consequences of same. In answering this question set out what further information, if any, you might need.

The European Insolvency Regulation Recast (EIR Recast) would not apply as it ceased to have effect in the UK following its exit form the European Union on 31 December 2020. Accordingly, if proceedings are commenced in another European country, the UK courts will not be able to rely on the provisions of the EIR Recast and the insolvency practitioner appointed in the UK will likely need to liaise with insolvency representatives appointed in other jurisdictions as their ability to deal with the assets of FFLP will naturally be curtailed by the ongoing proceedings in those other jurisdictions. Such cooperation was permitted by the House of Lords in McGrath -v- Ridell where the Court ordered the distribution of assets in the UK to a foreign liquidator. This is commensurate with s426(5) of the Insolvency Act 1986, which authorises the local court to apply either their own rules or those of the foreign jurisdiction.

It would be beneficial to consider the MLCBI

3.5

Marks awarded 11 out of 15

*** End of Assessment ***

TOTAL MARKS 39/50

A very good paper that generally addresses the questions asked and substantiates its answers.